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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD H. WHITE, *Petitioner*,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. Whether a post-judgment request for an award of attorney's fees under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. §1988, as amended [the "Fees Act"], is a motion to alter or amend a judgment governed by Rule 59(e) of the Federal Rules of Civil Procedure.

II. Whether the First Circuit properly urged counsel to consider the issue of attorney's fees during settlement negotiations.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

On March 8, 1976, the petitioner, Richard H. White, commenced an action in the United States District Court for the District of New Hampshire challenging certain administrative procedures of the respondent New Hampshire Department of Employment Security. The petitioner alleged that delays in the processing of a certain class of applications for unemployment benefits violated the due process clause of the Fourteenth Amendment of the United States Constitution as well as the "when due" provision of the Social Security Act, 42 U.S.C. §503(a) (1), and also raised a pendent state claim alleging violation of state law regarding determination of eligibility for benefits. J.A. 5-16. The complaint alleged jurisdiction under 28 U.S.C. §§1343 (3) and (4) and 42 U.S.C. §1983. J.A. 6. The complaint requested class certification under F.R.Civ.P. 23(c) (1) and sought declaratory and injunctive relief under 28 U.S.C. §§2201 and 2202 and F.R.Civ.P.57, but did not request attorney's fees. J.A. 13-15.

The district court (Bownes, J.) granted class certification on May 11, 1976, and the case was tried (after extensive discovery) to the court on October 12 and 13, 1977. In its opinion and order of November 15, 1977, the court found that respondents' procedure for processing the claims in question did violate the "when due" provision of the Social Security Act and on that basis entered an order granting declaratory and injunctive relief. J.A. 25-26. The court entered a subsequent amendatory order on December 16, 1977. J.A. 27-28. Neither order made any reference to a possible award of attorney's fees.

The respondents appealed on December 22, 1977 to the Court of Appeals for the First Circuit. J.A. 3. While the appeal was pending, the respondents initiated settlement negotiations with petitioner, and an agreement was ultimately reached. J.A. 44-45, 54-55. The consent decree was signed by the parties on December 8, 1978, and upon respondents' motion, the First Circuit remanded the matter to the district court on December 11, 1978 for the purpose of entertaining the decree. J.A. 29-30. The district court (Devine, J.) approved the decree on January 26, 1979 and the clerk entered judgment the same day. J.A. 31-33. Neither the consent decree nor the judgment made any reference to attorney's fees.

Over four months after entry of judgment, the petitioner, on June 7, 1979, moved for fees under 42 U.S.C. §1988. After respondents' objection, the district court conducted a hearing, and on August 30, 1979, awarded the petitioner attorney's fees in the amount of $16,644.40. Respondents' subsequent motion to vacate the consent decree, J.A. 81-82, was denied on October 1, 1979. J.A. 83-91. Respondents appealed both the fees award and the denial of the motion to vacate. Both appeals were consolidated by the First Circuit. J.A. 4.

The Court of Appeals (Campbell, J.), on August 12, 1980, vacated the fee award. *White v. New Hampshire Department of Employment Security*, 629 F.2d 697 (1st Cir. 1980). The court ruled that the district court did not have jurisdiction over the

late fee application. In holding in favor of the respondents, the court considered only the timeliness issue, finding that the post-judgment motion for the award fees under §1988 was a motion to alter or amend the judgment and was hence governed by Rule 59(e) of the Federal Rules of Civil Procedure. 629 F.2d at 699. *See* J.A. 92-107.

The court found no clear indication that Congress, by generally describing attorney's fees in relation to costs of litigation, intended that attorney's fees be subject to the provisions for costs set out in Rule 54(d) of the Federal Rules of Civil Procedure, and found the "fees/costs comparison strained at best." 629 F.2d at 702-703.

The Court of Appeals further reasoned that the ultimate award of fees is clearly a part of the relief sought by the prevailing party to be granted during the course of the proceeding. 629 F.2d at 704. Analyzing the relevant language of §1988, that in "an action or proceeding to enforce" the civil rights law fees would be available, the court found that a fee award under §1988 is not sufficiently collateral and independent to be considered in a proceeding apart from the disposition of the merits.

Finally, the Court of Appeals addressed the ethical conflict hypothesized by the petitioner by noting that its decision requires only that the party seeking an award of fees "face up to the issue of fees" in an procedural sense before entry of final judgment. 629 F.2d at 705. The court noted that failure to confront the fees issue "muddied the waters," but cautioned that attorneys in settlement negotiations should not hold out, against a client's best interests, for a specific fee award to be included in the consent decree. Nothing was to be gained, noted the court, by leaving the fees issue unmentioned and by submitting the issue to the court months later under conditions which cast a shadow upon the settlement itself. *Id.*

The petitioner thereafter petitioned this Court for a writ of certiorari on December 10, 1980, which was granted on May 18, 1981. ___ U.S. ___, 68 L.Ed.2d 839 (1981).

SUMMARY OF ARGUMENT

I. A. American courts have traditionally treated an award of attorney's fees differently from an award of court costs. Although court costs are routinely granted to a victorious party, attorney's fees are not unless specifically authorized by statute or unless the request falls within an exception to the general prohibition of fees awards. Congress, in enacting the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, as amended, recognized and preserved the traditional distinction between fees and costs. The Congress, by authorizing an award of attorney's fees as part of the costs, did not intend to abrogate the longstanding distinction between fees and costs. The purpose of the Fees Act was to provide all civil rights litigants an opportunity to recover fees, not to create a "startling new remedy."

Rule 54(d) is therefore inapplicable to a motion for attorney's fees under the Fees Act. The term "costs" as used in Rule 54(d) and 28 U.S.C. §1920 does not include attorney's fees. The meaning of "costs" under the statute and rule must be determined by reference to the contemporaneous meaning of the term at the time the statute and rule were enacted. Recoverable costs have traditionally not included attorney's fees, and therefore both Rule 59 and §1920 were not intended to govern a fees request. The rule and the statute recognize the important differences between fees and costs. The routine award of costs is usually made in the absence of controversy. Items of taxable costs are usually fixed in amount and of relatively small expense. To the contrary, an attorney's fees award is frequently disputed and requires careful review by a court to determine its reasonableness. Fees awards also can impose a significant financial burden on the losing party. Given these fundamental differences between costs and fees, it is apparent that Rule 54(d) is not applicable to a fees request.

B. 1. A post-judgment award of attorney's fees is governed by Rule 59(e). This rule applies to final judgments, and is operative when the successful party has failed to make a request for fees prior to the entry of final judgment.

However, if the prevailing party has made the request prior to entry of judgment, the judgment will not be final until the fees issue is resolved. In this situation, Rule 59(e) does not apply as the judgment is not final until all issues are resolved. Where the fees litigant has not made the fees request prior to entry of final judgment, Rule 59(e) gives the party a second chance to obtain the fees award by making the request within ten days after entry of final judgment.

2. A motion for attorney's fees is a motion to alter or amend a judgment within the meaning of Rule 59(e). The rule governs all motions which attempt to alter or amend the prior judgment. A fees request is governed by this final judgment rule unless it falls within an exception to the rule. The two exceptions arise when an attorney seeks to enforce a right of his own and when fees are sought out of a common fund. As the Fees Act allows an attorney's fee award only to a prevailing party, only the common fund exception might apply to this case.

3. An award out of a common fund is fundamentally different from an award under the Fees Act. Common fund awards, in theory, apportion the fees award among co-plaintiffs. The adverse party's liability is not altered by charging the common fund with attorney's fees. The Fees Act instead places the financial burden upon the losing party. He therefore has a direct and compelling interest in the assessment of fees, as his potential liability is significant. Thus, an attorney's fees award under the Fees Act does not fall within the common fund exception.

4. A request for attorney's fees is intimately tied to the merits of the underlying action. Congress has authorized payment "in any action or proceeding . . . to a prevailing party." The language of the statute ties the fees award directly to the merits of the case and directs that it be made in the same motion or proceeding. A post-judgment motion for fees, by seeking to impose on the losing party a significant additional liability arising out of the matter otherwise resolved by the judgment, is precisely the type of request to

alter or amend the prior judgment that is contemplated by Rule 59(e). By requiring a timely submission for fees, Rule 59(e) also promotes fairness to all parties, is sensitive to the policy of finality of judgments, and promotes the interests of judicial economy.

II. The First Circuit decision avoids ethical conflicts. Parties to settlement negotiations are not required to simultaneously negotiate a fees award with the merits. Parties are only to "face up" to this issue. This approach is practical in that it recognizes the existence of the fees issue and encourages parties to attempt its settlement. A safety valve is provided, however, as parties need *not* resolve the fees issue in settlement negotiations. It may, as the First Circuit recommended, be specifically reserved in a consent decree for subsequent consideration by the court. The First Circuit decision clearly does not create an ethical conflict. Rather, it suggests a practical approach to settlement negotiations. The decision promotes fairness to all parties by giving both sides an opportunity to be aware of the intentions of the opposing party and the extent of their liability in reaching settlement, and in this regard furthers, not hinders, ethical considerations.

ARGUMENT

I. A POST-JUDGMENT MOTION FOR ATTORNEY'S FEES UNDER 42 U.S.C. §1988 SUBSTANTIVELY ALTERS THE PRIOR JUDGMENT AND MUST THEREFORE MEET THE REQUIREMENTS OF RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 59(e) of the Federal Rules of Civil Procedure provides that motions to alter or amend judgments shall be filed within ten days after entry of judgment. This rule applies to motions for attorney's fees, unless a fees request is in effect a motion for costs under F.R.Civ.P. 54(d) or such a request constitutes a matter collateral or independent to the merits of the underlying case. Contrary to petitioner's assertions, a fees motion under 42 U.S.C. §1988 cannot be considered to be a motion for costs governed by Rule 54(d), nor is such a

motion so collateral or independent to the merits of the main action that it may be determined at any time after entry of judgment.

A. As the Concept of the Award of Attorney's Fees Differs Substantially From the Concept of Payment of "Costs," Rule 54(d) is not Applicable to a Motion for Attorney's Fees under 42 U.S.C. §1988.

The traditional American Rule governing the award of attorney's fees carefully distinguishes between the "costs of litigation", which are borne by the parties to the litigation, and "court costs", which are usually allowed to a prevailing litigant. The American Rule, deeply rooted in our system of justice, requires that all litigants pay their own expenses of litigation, including attorney's fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714 (1967). However, certain routine "costs" are by statute, 28 U.S.C. §1920, and rule, F.R.Civ.P. 54(d), usually recovered by the prevailing party. These costs are capable of routine determination and are usually awarded without engendering controversy. *White*, 629 F.2d at 702. The American Rule creates a distinction between expenses of litigation such as attorney's fees and routine court costs. The latter may be recovered as a matter of course; the former may be allowed only if provided by statute or if the fee request comes within one of the narrow exceptions to the rule.[1] *Alyeska* at 258, 264.

In response to this Court's *Alyeska* decision, which precluded judicial application of the "private attorneys general" concept in the absence of statutory authorization, the Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 42 U.S.C. §1988, as amended. *See*, S.REP. No. 94-1011, 94th Cong., 2d Sess. (1976). The purpose of

[1] The exceptions to the American Rule include award of fees for disobedience of a court order, exercise of bad faith, *Alyeska* at 258, payment of attorney's fees out of a common fund, *Cohen v. Beneficial Industrial Finance Corp.*, 337 U.S. 541 (1949), and cases in which an attorney seeks to enforce a right of his own. *See Dietrich v. Grinnel Corp.*, 495 F.2d 448 (2d Cir. 1974).

this statute was to ensure that prevailing litigants in the various civil rights cases would have a similar opportunity to receive attorney's fees. The Fees Act provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[2]

This language does not, however, abrogate the traditional distinction between costs and attorney's fees. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, (1980); *Obin v. District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, 49 U.S.L.W. 2814 (8th Cir. June 11, 1981) (No. 80-1315); *Hirschkop v. Snead*, 475 F.Supp. 59 (E.D.Va. 1979), *aff'd on other grounds*, 646 F.2d 149 (4th Cir. 1981). *Contra, Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980); *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980).

Petitioner asserts that Congressional use of the phrase " . . . attorneys fees as part of the costs" is dispositive and fees may therefore be recovered at any time after judgment through Rule 54.[3] This reasoning suggests that recovery of fees by the

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[2] This language is borrowed from similar language under other civil rights statutes. *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3. In considering the applicability of Rule 54(d) to an attorney's fees request, the Senate Report on the Civil Rights Act of 1964 stated that attorney's fees could not be " . . . awarded as costs, for attorney's fees are not costs as that term is used in rule 54(d) of the Federal Rules of Civil Procedure." *U.S. Code Congressional and Administrative News*, 88th Cong., 2d Sess, 2360 (1964). The final version of this legislation included the subject attorney's fees provision.

[3] However, under 42 U.S.C. §1988, a prevailing party may receive costs but not obtain an award of attorney's fees. Similar results have occurred in application of the attorney's fees provisions of the Civil Rights Act of 1964, 42 U.S.C. §2000-e(5) (k). *See McCampbell v. Chrysler Corp.*, 425 F.Supp. 1326, 1328 (E.D. Mich.

prevailing party is through a ministerial process. This approach ignores important language in the statute which demonstrates that attorney's fees are to be treated separately from the matter of routine costs.

The Fees Act states in part:

> "... the court, *in its discretion, may* allow the prevailing party ... *a reasonable attorney's fee* as part of the costs." (emphasis added)

This language indicates that an award of attorney's fees shall be the result of the court's careful consideration of an appropriate request for fees. Indeed, many of the circuit courts have established detailed procedures for the consideration of fee awards. *See, e.g., King v. Greenblatt,* 560 F.2d 1024 (1st Cir. 1977), *cert. denied,* 438 U.S. 916 (1978); *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). To the contrary, statutory costs may be awarded by the clerk, 28 U.S.C. §1920, and may be taxed upon one day's notice. Rule 54(d). As noted by the First Circuit, a fee award, in addition to requiring scrutiny by the court, may well be the source of dispute between the parties and could lead to imposition of a significant financial burden on the losing party. 629 F.2d at 703. *See also Obin v. District No. 9 of the Int'l Ass'n of Machinists,* ___ F.2d ___, 49 U.S.L.W. 2814 (8th Cir. June 11, 1981) (No. 80-1315); and *Hirschkop v. Snead,* 475 F.Supp. 59 (E.D.Va. 1979), *aff'd on other grounds,* 646 F.2d 149 (4th Cir. 1981), stating:

> "There can be no doubt, however, that the attorney's fee to be allowed 'as part of the costs' under §1988 is qualitatively different from the costs allowed as of course to the prevailing party under Rule 54(d)." *Id.* at 61.[4]

1977). *See, The U.S. As Prevailing Defendant in Title VII Actions: Attorneys' Fees and Costs,* 66 Geo. L.J. 899, 917-922 (1978).

[4] As noted by the Solicitor General in the *Brief for the United States as Amicus Curiae* at 7-8, "... Congress was aware of at least sixteen other statutory provisions in existence at the time of passage of section 1988 that contained the identical language. Congress was

Fees, unlike costs, are not allowed as a matter of right to the prevailing party. A court awards attorney's fees in the exercise of its discretion, guided by a substantial body of case law. A successful plaintiff in a civil rights action should ordinarily recover attorney's fees unless special circumstances would render such an award unjust. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 403 (1968). A prevailing defendant, on the other hand, may receive a fees award upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).[5] The fact that one is a prevailing party is not dispositive of the fees award issue. Prior to an award to a prevailing plaintiff, there may be an inquiry as to the existence of special circumstances[6] that might bar the award. Prior to the award to a prevailing defendant, there must be an inquiry as to whether the plaintiff's case was frivolous, unreasonable, or without foundation. In either case, there must be review by the court.

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also aware that there were approximately 90 federal statutory provisions providing in similar terms for an award of attorneys fees. . . . We do not believe that the particular wording of the fee provision is of substantial assistance in determining the timeliness of a motion for fees."

[5] Although *Christiansburg* and *Newman* did not review the Fees Act, they construed language identical to the Fees Act. Congress, in considering the "prevailing party" language of the act, specifically approved these judicial interpretations and intended that they be applied to the Fees Act. S.REP. No. 94-1011, 94th Cong., 2d Sess. 6 (1976), *accord*, *Hughes v. Rowe*, ___ U.S. ___, 66 L.Ed.2d 163 (1980).

[6] "Special circumstances" mitigating against an award otherwise authorized by statute are illustrated in the following decisions: *Aho v. Clark*, 608 F.2d 365 (9th Cir. 1979) (consent agreement sought to eliminate further expense of litigation; therefore, award of fees alters circumstances giving rise to signing of decree, and is unduly harsh and unjust; moreover, as purpose of act is to attract competent counsel, Congressional policy not advanced, as litigation com-

The House Report on the Fees Act noted that the legislation had three key features: awards *may* be made to the prevailing party, fees are to be allowed in the court's discretion, and awards are to be reasonable. H.R. REP. NO. 94-1558, 94th Cong., 2d Sess. 6 (1976). In discussing the discretionary aspect of a fees award, the House Judiciary Committee noted that it

> "... adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions." *Id.* at 8.

This cautious approach demonstrates that the Congress did not intend to make a radical departure from existing precedent relating to the issue of attorney's fees.

> "This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal Courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May [*Alyeska*, 421 U.S. 420 (1975)] decision." S.REP. NO. 94-1011, 94th Cong., 2d Sess. 6 (1976).

The respondents submit that by treating a fee request under 42 U.S.C. §1988 as a request for costs under Rule 54(d), the petitioner is asking this Court to fashion the very "startling new remedy" Congress specifically sought to avoid.

In support of this contention, petitioner cites *Hutto v. Finney*, 436 U.S. 678 (1978) for the proposition that fees are costs and a request for fees is therefore covered by Rule 54(d). A close examination of *Hutto* is therefore in order. *Hutto* concerned conditions of confinement in the Arkansas prison system, which was described as a "dark and evil world

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menced prior to effective date of Fees Act); and *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978) (where damage to complainant was essentially of a private nature, and where no evidence of bad faith on the part of the defendant existed, award of fees deemed unnecessary to further purposes of Fees Act (cited with approval in *Aho v. Clark, supra*)).

completely alien to the free world." *Hutto* at 681. After protracted litigation, the district court found that the state had acted in bad faith and awarded attorney's fees. *Id.* at 685. On appeal, the circuit court awarded additional fees based upon 42 U.S.C. §1988. The state challenged both awards as being contrary to the Eleventh Amendment of the United States Constitution. The district court award was affirmed on the basis of the bad faith exception to the American Rule. In affirming the circuit court's award of fees on appeal, this Court, citing Congress' failure to exempt states from fee awards, noted that the Eleventh Amendment does not bar awards of attorney's fees against states. *Id.* at 692. This Court also noted that the Eleventh Amendment had not traditionally been viewed as a bar to an award of costs against the states, and it similarly would not bar an award of "fees as part of the costs" under 42 U.S.C. §1988. *Id.* at 695. This Court found there was ample precedent for Congressional authorization of an award of fees as part of costs, noting, however, that fees are not routinely awarded. *Id.* at 697.

However, *Hutto* provides little guidance to the decision of the issues in this case. In *Hutto*, the state, which was specifically found to have acted in bad faith, sought to shield itself from liability for attorney's fees by invoking the Eleventh Amendment. This Court found that Congress, in enacting the Fees Act, provided an additional enforcement remedy to the more general provisions of 42 U.S.C. §1983, this remedy being enacted pursuant to the constitutional enforcement powers under section 5 of the Fourteenth Amendment to the United States Constitution. Thus, this Court found in §1988 an implied Congressional waiver of the states' Eleventh Amendment immunity. This Court ruled in effect that it would not single out attorney's fees as one type of litigation expense, distinguishable from costs, which an unsuccessful state defendant would not have to pay. The *Hutto* court did not specifically address the issue of the distinction of fees and costs, nor did it address the issue of the timeliness of a fees request. Indeed, one may take the view that *Hutto* viewed fees as one of the many costs — or expenses — of litigation for which a prevailing party may seek

recovery against a state under the Fees Act, without regard to Eleventh Amendment immunity.

This Court has recently spoken on the issue of the distinction between fees and costs. In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court rejected the "superficially appealing argument" that the language of the Fees Act requires that attorney's fees be treated as costs under 28 U.S.C. §1927. *Id.* at 758. The issue was what sanctions could be imposed upon an attorney who unreasonably extended court proceedings. Roadway argued that as a prevailing party in a 42 U.S.C. §1983 action, it should not be limited to the remedy of 28 U.S.C. §1927[7] against an unreasonable lawyer, and that §1988 should be read into §1927 to allow fees as part of the costs. *Id.*

In construing the word "costs," this Court focused on the contemporaneous meaning of the term when the predecessor statute to 28 U.S.C. §1927 was enacted. *Id.* at 759. When the statute was first enacted in 1813 and subsequently amended in 1853, the term "cost" was not understood to include attorney's fees. Section 1927 was viewed as only allowing recovery of excess costs against counsel who vexatiously prolonged litigation. This Court ruled that the more reasonable construction was that the definition of "costs" in the companion statute of 28 U.S.C. §1920[8] controlled those costs which could be recovered under §1927, a result which is consistent with the American Rule on recovery of attorney's fees. In the absence of Congressional addition of the term "fees" to either §1927 or §1920, this Court declined to judicially impose the remedy of fee recovery. *Id.* at 760.

A similar analysis governs the application of Rule 54(d). This rule continues the general rule that attorney's fees are distinguishable from court costs. *See generally* 6 MOORE'S FEDERAL PRACTICE *p*54.70 (2 Ed. 1976). Since attorney's fees have not traditionally been considered a recoverable "cost"

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[7] The text of 28 U.S.C. §1927 is set out in the appendix.

[8] The text of 28 U.S.C. §1920 is set out in the appendix.

of litigation, Rule 54(d) was not intended to govern a post-judgment motion for attorney's fees. *Id.*, *p*54.77(2).

The *Roadway* Court also declined to read the provisions of the Fees Act into 28 U.S.C. §1927, and held the act inapplicable as it did not relate to attorney conduct. However, the Court noted:

> "The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy. Unlike §.927, both §1988 and §2000e-5 (k) restrict recovery to prevailing parties." *Roadway* at 762.

The Fees Act therefore treats prevailing plaintiffs and defendants differently, a distinction which encourages suits by victims while deterring frivolous litigation. The Court rejected the contention that §1988 supplanted the cost concept established by §1920 and §1927. *Id.* at 763.

Although not precisely on point with the timeliness issue in this case, *Roadway* establishes several controlling principles. Fees are not included within the meaning 28 U.S.C. §1920. As such, a motion for award of fees under 42 U.S.C. §1988 cannot be considered to be a request for costs under Rule 54(d). In interpreting the Fees Act, consideration must be given to the treatment of "fees" and "costs" at the time the statute was enacted. Under the American Rule, fees were considered wholly apart from costs, and were not recovered unless authorized by statute or some exception. *Alyeska*, 421 U.S. 240 (1975). Congress passed the Fees Act solely to meet the technical requirements of *Alyeska*, but not to create startling new remedies. S.REP. No. 94-1011, 94th Cong., 2d Sess. (1976). Congress intended to promote private litigation of civil rights cases by allowing the remedy of recovery of attorney's fees in addition to costs which ordinarily would be recovered. Congress, by specifically adopting existing case authority, preserved the existing distinction between fees and costs. To interpret the Fees Act as petitioner suggests would eliminate the distinction Congress recognized and would be contrary to this Court's holding in *Roadway*.

Indeed, in *Roadway* a remedy was suggested to the Congress: the language of §1927 or §1920 could be altered to specifically allow recovery of attorney's fees. *Roadway* at 760, n.8. Heeding this advice, Congress amended 28 U.S.C. §1927 in 1980 to provide that counsel's liability for excess costs also included liability for attorney's fees. Significantly, Congress chose not to broaden the definition of costs under 28 U.S.C. §1920, which would have ensured the applicability of Rule 54(d) to a request for attorney's fees.

The general distinction between costs and fees thus survives, as do the policy reasons for the distinctions. Fee awards are likely to be disputed, depend upon the exercise of the court's discretion, and must be evaluated in light of several criteria. Costs, on the other hand, can be expeditiously determined as a matter of routine, can be awarded without controversy, and usually without the necessity of a hearing. Rule 54(d) is tailored to these principles, as is Rule 58. Costs, not being a matter of controversy or a great burden to the party taxed, but rather of a more predictable nature, may be recovered in the absence of time limitations, and the judgment obtained need not be delayed for the taxing of costs. In a sense then, costs are always "reasonable" and do not need judicial review to protect the party taxed. To hold that fees are governed by Rule 54(d) would unnecessarily blur the obvious differences between fees and costs, and would apply Rule 54(d) to a complex matter to which it was not intended to apply.[9]

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[9] Petitioner cites *Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980) and *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980) as support for his view that Rule 54(d) governs a motion for fees under 42 U.S.C. §1988. *Bond*, citing *Knighton*, viewed 54(d) as controlling its decision that fees motions under §1988 would be disposed of under Rule 54(d). *Bond* at 1234. The Seventh Circuit, unlike the First Circuit in *White*, 629 F.2d 697 (1980), or the Fifth Circuit in *Knighton*, included very little analysis of the issue, apparently choosing to ride on *Knighton's* coattails.

Knighton considered the fees issue from a perspective different from *White*: fees motions, it determined, were unlike a motion to

B. A Motion for Attorney's Fees Under 42 U.S.C. §1988 After Final Judgment Seeks a Fundamental Alteration of the Prior Judgment and is Therefore Governed by Rule 59(e).

1. The consent decree entered below was the final judgment in this case, and could be modified only as allowed by rule 59(e).

As the *White* court stated, 629 F.2d at 702, 703, a motion for attorney's fees after *final* judgment is governed by Rule 59(e). A §1988 fees motion after a final judgment could result in substantial additional liability to a losing party after all aspects of the litigation are otherwise terminated. The key to this analysis is the "finality" of the judgment. If the judgment is not final because issues or claims for relief are left unresolved, *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976), Rule 59(e) is simply inapplicable. Petitioner, however, confuses this issue when he mingles the concepts of finality and appealability.

Whether a court order is appealable under the applicable provision of 28 U.S.C. §§1291 *et seq.* is not necessarily related to whether an order is final for the purposes of Rule 59(e).

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alter or amend a judgment under Rule 59(e), but rather sought merely to obtain what was due because of the judgment. *Id.* at 797. Consequently, there was no time limit on a fees request under the Fees Act. However, the Fifth Circuit, in a previous case, held that the term "costs" did not include attorney's fees, and that such motions must comply with Rule 59(e). *Stacy v. Williams*, 446 F.2d 1366 (5th Cir. 1971). The *Stacy* court noted that a request for fees was in effect a request for new relief, and the provisions of Rule 59(e) were "particularly applicable." *Id.* In *Knighton*, the Court of Appeals distinguished *Stacy* as representing the rule to be followed in "bad faith" cases. In such cases, fees should be sought as part of the litigation itself. The *Knighton* court did recognize that this internal conflict in the Fifth Circuit on the award of attorney's fees created a problem, but the problem could be solved by local rule. *Id.* at 798, n. 2. As does the First Circuit in *White*, at 702, respondents respectfully disagree with the *Knighton* court. Not only does the *White* court establish a sounder rule, but it recognizes the practical distinctions between fees and costs.

An order or judgment is final for the purposes of Rule 59(e) when it

> "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Gurule v. Wilson*, 635 F.2d 782, 786 (10th Cir. 1980).

A judgment which does not adjudicate all pending claims for relief, including an unresolved claim for attorney's fees, is not a final judgment for the purposes of Rule 59(e). *Gurule, supra; Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977); *cf. Liberty Mutual v. Wetzel, supra.* In the absence of a *final* order, Rule 59(e) does not apply. A fee request is thus not subject to Rule 59(e) until a *final* judgment adjudicating all issues and claims is entered. Petitioner's suggestion (brief at 34-36) that several independent requests for attorney's fees will have to be made each time an order adjudicating a certain aspect of the litigation is entered is incorrect. Such interim orders are not subject to Rule 59(e) as they do not fully adjudicate all claims and issues before the court.[10] Although sound practice would normally call for a prayer for fees at the outset of the litigation, Rule 59(e) does not bar a motion for fees by a prevailing party until ten days after final resolution of all claims and issues in the suit. Indeed, application of the rule gives the party who initially failed to affirmatively seek a fees award a second chance to obtain the relief.

In the case at bar, there was unquestionably a final judgment. Upon respondents' request (J.A. 29), the First Circuit remanded the case to the district court for the purpose of

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[10] There are limited exceptions to the general rule that fees will not be awarded until after a final judgment is entered. These cases generally involve protracted litigation where delay of the award may impose hardship. District courts may in such cases award fees and costs incident to disposition of interim matters. *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 723 (1974); *accord, Hanrahan v. Hampton*, 446 U.S. 754 (1980). However, failure to ask for fees at the time of an interim order does not preclude a request for fees for the entire litigation by the prevailing party at any time before final judgment is entered, or within ten days thereafter. F.R.Civ.P. 59(e).

entertaining a consent decree (J.A. 30). The parties signed the consent decree on December 8, 1978 (J.A. 45), and judgment was entered on January 26, 1979 (J.A. 33). The petitioner's original complaint made no claim for fees (J.A. 5-15) and likewise the consent decree made no mention of attorney's fees (J.A. 31-32). Thus, not only did the consent decree fully and finally adjudicate all issues raised in the litigation, it implicitly embodied the parties' *agreement* that the matter was fully and finally resolved through entry of the consent decree. Even though petitioner failed to take advantage of the six weeks between signing the consent decree and entry of judgment to resolve the fees issue, he had an additional ten days after entry of the judgment to file a formal motion with the district court. Petitioner's counsel clearly had this matter in mind on January 31, 1979 — five days after entry of judgment — when he drafted a fees request letter to respondents' counsel. J.A. 45. Petitioner cannot now argue that application of Rule 59(e) is unduly burdensome. A timely motion to the court giving notice of the fees claim is all that was required to protect his fees request under 42 U.S.C. §1988. As the First Circuit noted:

> "We add that we see our decision as imposing no great hardship on civil rights litigants or courts. Doubtless persons such as the present litigants who have acted prior to this decision have greater cause for complaint than will those who follow them, but most fees litigants who have previously come to our attention have taken pains to request fees prior to or within ten days following entry of judgment, . . . the state of the law has surely been such as to suggest the wisdom of that course." 629 F.2d at 704 (citations omitted).

2. Rule 59(e) applies to all motions to alter or amend a judgment, including a new claim for substantive relief.

Petitioner suggests that Rule 59(e) should be narrowly read to encompass only motions requesting a court to correct errors of law (brief at 28-29). This argument is based on the theory that the rule was only intended to clarify the situation described in *Boaz v. Mutual Life Insurance Co. of New York*, 146 F.2d 321 (8th Cir. 1944), which held that the district court

had the inherent power to entertain a post-judgment motion to correct an error. This view unreasonably constricts the scope of Rule 59(e) and fails to give due consideration to the broad application of the rule to "a motion to alter or amend the judgment."[11] In this case, petitioner plainly sought to alter or amend the judgment by, for the first time, seeking substantial new relief. This motion for fees flowed from the

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[11] Cases cited by the petitioner to defeat applicability of Rule 59(e) have no application to the procedural posture of the instant case. *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944) was handed down prior to the promulgation of Rule 59 and asserts the court's inherent power to correct errors or omissions. The remaining cited cases merely recite examples of Rule 59(e)'s applicability in situations wholly dissimilar to the instant case. *See, e.g., Continental Casualty Co. v. American Fidelity and Casualty Co.*, 186 F.Supp. 173 (S.D. Ill. 1959), *aff'd*, 275 F.2d 381 (7th Cir. 1960) (Rule 59(e) applicable to motion to vacate judgment for misconstruction of state law and misinterpretation of insurance policy provision); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978) (motion for rehearing or reconsideration of order denying stay of execution of writ of *habeas corpus* is governed by Rule 59(e)); *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 68 L.Ed.2d 213 (1981) (court specifically reserved question of fees for further disposition); *Tucker v. Reading Co.*, 335 F.Supp. 1269 (E.D.Pa. 1971) (motion to vacate order as to third-party liability for contribution is governed by Rule 59(e)); *Maryland Tuna Corp. v. MS Benares*, 429 F.2d 307 (2d Cir. 1970) (motion to "re-settle issues" is a motion governed by Rule 59(e)); *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir. 1971) (motion to vacate order of dismissal is governed by Rule 59(e)); *Seshachalom v. Creighton University School of Medicine*, 545 F.2d 1147 (8th Cir. 1976), *appeal dismissed on other grounds*, 549 F.2d 79 (8th Cir), *cert. denied*, 433 U.S. 909 (1977) (motion for new trial governed by Rule 59(b) and motion for extension of time to file notice of appeal is governed by 59(e)); *Sack v. Low*, 478 F.2d 360 (2d Cir. 1973) (motion to vacate finding as to choice of law for limitation of action is governed by Rule 59(e)); *Rodgers v. Conemough & Black Lick R.R. Co.*, 137 F.Supp. 467 (W.D.Pa. 1956) (motion to reform verdict is governed by Rule 59(e)); *Consor v. Occidental Life Insurance Co. of California*, 469 F.Supp. 1110 (N.D. Tex. 1979) (motion to vacate judgment as to

main body of the action previously thought to be resolved in the January 26 judgment, and sought to impose a substantial new liability on the respondents. 629 F.2d at 703, 704; *accord, Gurule v. Wilson,* 635 F.2d 782 (10th Cir. 1980); *Hirschkop v. Snead,* 475 F.Supp. 59 (E.D.Va. 1979), *aff'd on other grounds,* 646 F.2d 149 (4th Cir. 1981).

Petitioner's failure to raise and resolve the fees issue, a remedy available to him as a central part of the underlying cause of action, prior to the entry of final judgment precludes his late assertion of the remedy outside of the time period allowed for altering or amending the judgment. Rule 59(e) must apply, as otherwise civil rights litigants will be unsure as to the finality of judgments against them. Otherwise, final judgments might be reopened at any time for the purpose of imposing substantial new liabilities flowing from the cause of action previously thought to be resolved.

3. Rule 59(e) applies to a post-judgment motion for attorney's fees unless the particular request for fees comes within a recognized exception to the final judgment rule.

An award of attorney's fees is usually viewed contemporaneously with the merits or conduct of the underlying action. Parties who seek such awards must do so prior to entry of final judgment or within ten days thereafter as allowed by Rule 59(e), unless otherwise excepted.[12] There are two exceptions to this general rule. The first is when an

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class claim is governed by Rule 59(e)); and *Chi-Mil Corp. v. W.T. Grant Co.,* 422 F.Supp. 46 (E.D.Wis. 1976) (motion to amend judgment ordering specific performance of contract is governed by Rule 59(e)). Impressive as the list of authorities appears at first, not one case indicates that Rule 59(e) is inapplicable to a motion for fees under §1988. And even taken together, the cases do not preclude applicability of Rule 59(e) to a fees motion.

[12] *See, Stacy v. Williams,* 446 F.2d 1366 (5th Cir. 1971) (fee award based on bad faith of counsel must be requested within time period allowed by Rule 59(e)); *Gurule v. Wilson,* 635 F.2d 782 (10th Cir. 1980) (§1988 fee request must be made as provided in Rule 59(e)).

attorney seeks to enforce a right of his own, *cf. Dietrich Corp. v. King Resources Co.*, 596 F.2d 422 (10th Cir. 1979), and the second is when a party seeks reimbursement for fees out of a common fund, *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). The case at bar does not involve an attorney's assertion of his own right. The Fees Act states "... the court, in its discretion, may allow the *prevailing party* ..." a reasonable attorney's fee. Only a party, then, may seek a fees award. The question remains whether an attorney's fee award comes under the "common fund" exception to the final judgment rule.

The common fund theory allows an award of attorney's fees out of a fund created by litigation intended for distribution to a class, which is benefited thereby. Fees are generally awarded to the successful plaintiff to avoid unjust enrichment of the benefited class at plaintiff's expense. A variation of this theory was discussed in *Sprague v. Ticonic National Bank*, 307 U.S.161 (1939). In *Sprague*, the efforts of a successful plaintiff established as a matter of law a right of recovery for other similar plaintiffs from assets of the defendant. This Court had before it the question of whether the lower court had the general equitable power to entertain a petition for allowance of fees "as between solicitor and client." *Sprague* at 167. The issue of fees "as between solicitor and client" was not in issue in the underlying proceeding as the plaintiff sought recovery not from the losing defendant, but from the common assets to be shared with the common beneficiaries. *Id.* at 168. The issue of fees between the plaintiff and the common beneficiaries was not foreclosed by the original proceeding and could be determined in a separate proceeding. *Id.* at 170. In other words, recovery from the common fund imposed no additional burden on the losing defendant and was collateral to the original action. The defendant thus had no interest in recovery of attorney's fees from the common fund.[13] *Sprague* does not therefore sup-

[13] A different situation was considered in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In that diversity case, a

port the general proposition that an award of attorney's fees is independent of the merits of the underlying case.

This difference between the common fund theory and an award of fees under the Fees Act is further illustrated by *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). In *Mills*, a shareholder derivative suit, this Court elaborated on another variation of the common fund concept. Reimbursement of fees may be allowed where plaintiff's efforts confer a substantial benefit on a class even though there may not be a specific fund created by the suit. *Id.* at 392-395.

> "To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action *is not to saddle the unsuccessful party with the expenses* but to impose them on the class which has benefited from them and that would have had to pay them had it brought the suit." *Id.* at 396-397 (emphasis added)

The adversary party has no interest in the award of fees from the "common fund", as once it is identified, he has no interest in its distribution. The reimbursement of the plaintiff's fees from the fund prevents unjust enrichment of the benefited class and serves to proportionately spread the costs of litigation among those benefited. *Boeing* at 478. Distribution of the fund does not increase the losing defendant's exposure, *Id.* at 479, n. 5, and is consistent with the American

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New Jersey statute granted the right to a corporate defendant in a shareholder derivative suit to obtain "security" from a minority shareholder plaintiff. In *Cohen*, the federal district court refused to apply the statute and the corporate defendant immediately appealed the denial. This Court held that review of the denial of the statutory right after trial would be too late to prevent loss of the right to the defendant. *Id.* at 546. The Court said that the claimed right was appealable in advance of trial as it fell within a small class of claims which were collateral to the main dispute, and which could be determined independently of the merits. *Id.* This case does not stand for the general proposition suggested by petitioner in his brief at 33, that fee awards are separate from the merits of the case. Indeed, in *Cohen*, fees were not specifically in issue.

Rule against taxing the losing party with the victor's fees. *Id.* at 481.

A fee award under the Fees Act, however, has a direct and substantial impact on the losing party. Such awards can be significant, as in the case at bar where the district court awarded an amount in excess of $16,000 (J.A. 74-80). A fees award under §1988 is paid by the losing party, who obviously has a compelling interest in the amount of the award. The considerations supporting the common fund exception consequently do not apply to an award of attorney's fees under §1988. In fact, most common fund cases deal with economic litigation such as derivative suits. They cannot sustain an exception to the finality of judgment rule for fees awards under 42 U.S.C. §1988.

4. A motion for fees under 42 U.S.C. §1988 is directly related to the merits of the underlying cause of action.

The language of the Fees Act ties a motion for attorney's fees directly to the underlying cause of action in two respects. First, the statute provides that "in any action or proceeding" the court may, in its discretion, allow "to the prevailing party" a reasonable attorney's fee. The "in any action or proceeding" language

> "strongly indicates that the fee issue is one properly viewed as belonging within the main body of the already commenced civil rights action." *White*, 629 F.2d at 704.

Second, the statute allows fees to the "prevailing party," indicating that the fees award must, of course, be determined by reference to the party's success on the merits of the main action. This is consistent with the policy behind these and similar civil rights fees statutes of promoting private litigation of meritorious causes of action. *See e.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). As Congress intended to promote meritorious causes of action, it intended that reasonable awards be made in light of the substantive merit of the underlying claim.

> "The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrim-

> ination policy. Unlike [28 U.S.C.] §1927, both [42 U.S.C.] §1988 and [42 U.S.C.] §2000e-5(k) restrict recovery to prevailing parties." *Roadway Express Inc. v. Piper*, 447 U.S. 752, 762 (1980); *accord, Hirschkop v. Snead*, 475 F.Supp. 59 (E.D.Va. 1979), *aff'd on other grounds*, 646 F.2d 149 (4th Cir. 1981).

See also, Gurule v. Wilson, 635 F.2d 782, 787 (10th Cir. 1980) (an award of attorney's fees is an "integral part" of a §1983 action); and *Richerson v. Jones*, 551 F.2d 918, 922 (3rd Cir. 1977) (request for attorney's fees is not collateral to the main action).

Accordingly, as noted in *Hirschkop* at 62 and *White* at 700, the weight of authority in considering motions for attorney's fees made in various contexts favors the application of Rule 59(e). *See, e.g., Fase v. Seafarers Welfare & Pension Plan*, 79 F.R.D. 363 (E.D.N.Y. 1978), *aff'd on other grounds*, 589 F.2d 112 (2d Cir. 1978); *Stacy v. Williams*, 446 F.2d 1366 (5th Cir. 1971); *Glick v. White Motor Co.*, 317 F.Supp. 42 (E.D.Pa. 1970), *aff'd on other grounds*, 458 F.2d 1287 (3rd Cir. 1972); *DuBuit v. Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976); *Hill v. TVA*, 84 F.R.D. 226 (E.D.Tenn. 1979); *Gurule v. Wilson*, 635 F.2d 782 (10th Cir. 1980).

Other courts have reached the opposite conclusion. Yet, in so doing, difficulties are frequently encountered in wrestling with the fundamental unfairness of the result, leaving a losing party exposed to liability for potentially large fee awards for indefinite periods of time. *See Obin v. District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, 49 U.S.L.W. 2814 (8th Cir. June 11, 1981) (No. 80-1315). *Obin* agreed with the First Circuit that attorney's fees are substantively different from costs under Rule 54(d), but disagreed with the First Circuit's application of Rule 59(e) because a request for fees was a "collateral and independent claim". *Id.*, slip op. at 12n.7, 19. In reaching this decision, the *Obin* court cited *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). For the reasons cited in part B.*3* above, the respondents respectfully submit that *Obin's* reliance on *Sprague* is misplaced and that its holding that a fees award is collateral is thereby flawed. Even

though *Obin* concluded that the fees issue is collateral, it expressed

> "... a real concern over the fragmentation of appeals. In the interests of orderly and expeditious consideration of all issues arising from a single lawsuit, disputes on appeal over the merits, as well as disputes regarding the allowance of attorneys' fees to a prevailing party, should ordinarily be considered and decided by this court in either a single or consolidated appellate proceeding. This court deems it essential that all district courts follow a consistent practice of promptly hearing and deciding attorneys' fees claims in civil rights and other cases so that any appeal by an aggrieved party from the allowance or disallowance of fees can be considered by this court together with any appeal taken from a final judgment on the merits." *Id.* at 17.

The court suggested that the district courts meet this objective through a local rule requiring a motion for fees be made within twenty-one days of judgment. *Id.*

The *Obin* decision, which rejected the application of a *federal* rule to an attorney's fees motion, nevertheless recognized the chaos that would result from the application of *no* rule. Finding upon a false premise that a fees award was collateral, *Obin* chose to reject Rule 59(e). The resulting vulnerability of otherwise final judgments prompted the court to require some uniformity through the application of various local rules. Recovery of attorney's fees in a civil rights action, however, involves consideration of important national policies. Resolution of the timeliness issue must not be left to the proclivities of various district courts.[14] Fees motions must be determined by a rule of national application.

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[14] Interestingly, petitioner seems to agree with the need for a "uniform procedural approach to fee requests." Brief at 20-21, n. 16. The "uniform" approach petitioner suggests is a "flexible" one based on "the equitable doctrine of laches." This approach, however, would appear to do little to promote nationwide uniformity.

The rationale of the First Circuit is therefore sounder, as it subjects fees requests to a uniform, national, rule.[15]

5. Application of Rule 59(e) is fair, ensures certainty of final of judgments, and will discourage piecemeal litigation of civil rights cases.

Rule 59(e) provides a prevailing litigant with a second opportunity to obtain an award of attorney's fees. The rule will operate only in a situation where the litigant has failed or neglected to make a request for fees prior to entry of the final judgment. Where a pre-judgment request for fees has been made, the remedy has been preserved, and the judgment will not be final until the request is resolved. Rule 59(e) thus gives a prevailing party a second chance to overcome his previous failure to ask the court to award him attorney's fees.[16]

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[15] *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980) is cited for the proposition that a fees award under §1988 is a collateral matter. The Seventh Circuit did in fact reach that conclusion, *Id.* at 33, but only in the context of whether a fees award was appealable. Rule 59(e) was not in issue, especially since the prevailing party properly made his fees motion within nine days after entry of judgment, well within the jurisdictional limitation of the rule. *Id.* at 32. Even though it determined that a fees award was collateral, the court stated that the issue was best determined in light of the relative merit of the underlying case. It is thus advantageous, the court said, to quickly review a fees request, *Id.* at 34, as considerations governing the award — such as the relative merit of both parties' positions, competence of counsel, reasonableness of time sheets — are best determined contemporaneously with the merits. *Id.* Although not addressing the timeliness issue directly, the court implied that fee requests must at the very least be made expeditiously. This is, of course, the very desirable result the application of Rule 59(e) ensures.

[16] Two district courts have recognized the reasonableness of a ten-day rule governing fee motions since the time of the First Circuit decision in *White: Bryant v. International Schools Services, Inc.*, 502 F.Supp. 472 (D.N.J. 1980), suggesting observance of ten-day rule even though not established as rule in Third Circuit; and

The rule also assures fairness to the losing party. If a fee request could be made at any time after entry of final judgment, the losing defendant could never be confident of the validity and finality of the prior judgment. He would be exposed, theoretically forever, to a belated request for fees arising out of an action that was presumably terminated in the previous "final judgment." This protracted exposure to substantial new liability is contrary to the sound policy of finality of judgments and the fair expectation of the parties that a judgment terminates all matters relating to a particular lawsuit.

Swift adjudication of a post-judgment fees request has the added benefit of allowing the court and the parties to resolve the issue while memory of the merits of the underlying action and relative reasonableness of the parties' litigation stance is still fresh. This is particularly helpful to the court which must carefully weigh the fees request. Delaying the fees motion unreasonably complicates proof of the fee claim, which will additionally burden the court's limited time resource.

Suzuki v. Yuen, 507 F.Supp. 819 (D. Hawaii 1981) citing *White* and asserting in a footnote at 507 F.Supp. 821 that Rule 59(e) applies to fee motions under §1988. The purpose of the ten-day limitation expressed in Rule 59(e) is to assure timely submission of judicial business; it is not to require settlement of the issues raised in the motion within ten days of judgment. Fee requests in particular are susceptible to early submission to the court. *Perkins v. Standard Oil Co. of Calif.*, 399 U.S. 222 (1970) (motion filed during course of litigation); *Incarcerated Men of Allen County v. Fair*, 507 F.2d 281 (6th Cir. 1974) (motion made prior to final order entering consent decree; *See* trial decision, 376 F.Supp. 483 (N.D.Ohio 1973)). Fee requests have been made as a part of the pleadings as well. *See, e.g., Detroit v. Grinnel Corp.*, 495 F.2d 448 (2d Cir. 1974) (Clayton Act); *Richerson v. Jones*, 551 F.2d 918, 922 (3rd Cir. 1977); *Anderson v. Morris*, 500 F.Supp. 1095, 1105 (D.Md. 1980); *Gurule v. Wilson*, 635 F.2d 782, 787 (10th Cir. 1980); *Johnson v. University of Bridgeport*, 629 F.2d 828, 829 (2d Cir. 1980); and *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

The First Circuit decision also encourages the parties to "face up" to the issue of fees. 629 F.2d at 705. Nothing can be gained by ignoring the reality of the existence of the fees issue in a §1983 action and parties may, in a settlement context, be able to resolve the issue. If parties are unable to agree on the fees issue, nothing is to prevent them from agreeing to a consent decree which resolves the merits and specifically reserves the fee issue for a judicial determination. In this fashion, the parties can achieve relatively quick agreement on the underlying cause of action.

> "Entry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option when time is of the essence. Such a judgment might raise a question of finality should an appeal immediately be taken, [citation omitted] but even if non-appealable because still interlocutory the judgment would otherwise be effective. And the district court has the means to ensure, when necessary, the appealability of such a judgment. Under Fed.R.Civ.P. 54(b) the court may direct the entry of final judgment forthwith upon fewer than all claims presented upon determining expressly that there is no just reason for delay. Thus under our present decision the district court retains ample flexibility. Our decision merely ensures that fees, like all other matters in controversy, will be covered by a unified judgment which, absent express action under Rule 54(b), controls the entire case." *White* at 705.

The decision below recognizes the practical realities of settlement, and allows a flexible approach to settlement by the parties and the court. The prevailing litigant is not locked into a procedural straightjacket as petitioner suggests. The prevailing party has ample flexibility to attempt to resolve the issue in settlement or raise the issue after settlement by putting the adverse party on notice, within ten days after judgment, that he intends to obtain a fees award. To the extent the movant is unable to compose a complete submission within ten days after judgment — and in this case, petitioner had over six weeks to prepare the submission prior to entry of judgment — he may simply file a notice motion with

the court which will preserve his request. This submission sufficiently complies with Rule 59(e) and is further consistent with its policy of prompt notification of a request which alters or amends a judgment. The issue, thus reserved, can be determined in a subsequent court hearing, at which time the parties would present their evidence.

The subsequent hearing is the forum for proof of the claim, and its timing would no doubt be sensitive to the needs of both parties to prepare their respective submissions. Such hearings would obviously not occur on the tenth day after entry of judgment, and the prevailing party need not be ready to litigate the claim on the tenth day. While not forcing the prevailing party to immediately litigate the fees issue, the First Circuit decision does ensure that the fees request, once moved under Rule 59(e), will be heard and determined within a reasonable time after entry of judgment. And to the extent this rule promotes prompt review of fees requests, it also avoids the problem of piecemeal litigation by ensuring that the fees issue be resolved contemporaneously with entry of final judgment. This approach, with the added flexibility Rule 59(e), is sensible and fair to both parties.

This approach is also consistent with the policy of encouraging private litigation of civil rights cases. It does not prevent successful litigants from recovering attorney's fees. It provides a second shot for the litigant who fails to attempt resolution of the issue before final judgment. The First Circuit decision merely subjects these litigants to the same rules of finality of judgments which govern all other litigants. The result is fair. It applies a reasonable rule that allows uniformity of treatment of judgments, under which *all* litigants are treated alike.

II. THE FIRST CIRCUIT DECISION DOES NOT REQUIRE SIMULTANEOUS NEGOTIATION OF THE MERITS AND OF FEES AND THEREFORE CREATES NO ETHICAL CONFLICT.

The First Circuit realized that there is nothing wrong "with requiring the parties to face up to the issue of fees in

their settlement negotiations." 629 F.2d at 705. The question of fees is so integrally related to the merits that it is almost impossible for the parties not to look at the fees question, and the decision of the First Circuit merely requires the parties to timely confront the issue. Failure to do so, reasoned the court, calls the entire settlement into question. Although the *White* court required the parties to "face up" to the issue of attorney's fees, it did not require, nor did it suggest, simultaneous negotiation of the fee award. The First Circuit points out that no ethical problem need exist, nor is one intended, by its decision:

> "We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court . . ." *Id.*

The approach encouraged by the First Circuit is analagous to the conventional practice in settlement of money damages and attorney's fees. In *McDonald v. Chicago Milwaukee Corp.*, 565 (F.2d 416 (7th Cir. 1977), a class action brought by holders of railroad bonds and debentures, settlement was reached by creation of a fund for a subclass of former debenture holders. Attorney's fees, in the understanding of the litigants, were to be paid out of this fund. The court rejected the argument that the class attorney wrongfully negotiated simultaneously for the fund and for individual counsel fees, and the settlement was upheld.

The *McDonald* court reasoned that any amounts of money to be paid to the prevailing litigants were properly part of the settlement fund, and that they should be known and disclosed during settlement. Unless the defeated party is aware of the extent of its potential liability to the prevailing party, neither the defeated party nor the court can make an intelligent judgment as to the fairness and reasonableness of a proposed settlement. *Id.* at 423. This approach requires only *disclosure* of liability for fees. It does not require negotiation

of damages simultaneously with negotiation of individual counsel fees, and the court in fact recognized simultaneous negotiation as presenting an inherent conflict of interest as to the prevailing litigant's counsel. Because the appellate court found no evidence that improper negotiation had taken place, it refused to disturb the judgment, noting that a decision whether to accept or reject a settlement offer is a business judgment made by the parties, for which the court's business judgment is not to be substituted. *Id.* at 426-427.[17]

Settlements of attorney's fees in antitrust cases are also commonplace. In *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), the settlement provided for the payment of $1.25 million in attorney's fees in the court's discretion. *Grunin* was a class action brought under the Sherman and Clayton antitrust acts, seeking injunctive relief, treble damages, and attorney's fees, as provided by the statutes, 15 U.S.C. §§1, 2 and 14. Award of fees has become an integral part of antitrust litigation, and as *Grunin* recognizes, disclosure of liability for payment is consistent with sound settlement practice. The question of fees is also an integral part of all civil rights litigation. As the First Circuit states in its *White* opinion,

> "Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist." 629 F.2d at 705.

The approach followed by the First Circuit harmonizes with *Prandini v. National Tea Co.*, 577 F.2d 1015 (3rd Cir.

[17] It is not uncommon for settlement agreements to make provisions for attorney's fees. As a practical matter, a provision that fees and expenses of plaintiff's counsel be paid separately by the defendants over and above the settlement is generally disapproved. *See* 1 (Pt. 2) MOORE'S FEDERAL PRACTICE, *Manual for Complex Litigation*, *p*1.46 (2d Ed. 1980). Paragraph 1.46 of the *Manual* suggests disclosure of both damages and attorney's fees to secure district court approval of class action settlements pursuant to Rule 23(e) and indicates that failure to address the issue of attorney's fees may be improper.

1977), and *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 66 L.Ed.2d 83 (1980). The Third Circuit in *Prandini* noted with approval the desirability of settlements, as opposed to protracted litigation. In order to encourage settlement without compromising the plaintiff's rights, the *Prandini* court held that the trial court should insist upon two separate settlements, the first being the damage aspect of the case, the second concerning the awarding of attorney's fees. The court noted that

> [o]nly after court approval of the damage settlement should discussion and negotiation of appropriate compensation for the attorneys begin." 577 F.2d at 1021.

Mendoza adopts a similar procedure. As a practical matter, however, this dual approach need not be *required* in every class action settlement. A broad prohibition of negotiation of a fee award in a settlement context is neither necessary or desirable.[18] If the parties are able to settle both the merits and the fees issue in their negotiations, that approach should be encouraged. Protection is provided by court review and approval of the consent decree.

The *White* court, by merely requiring parties to "face up" to the fees issue, did not create an ethical problem. The decision does not require that the parties *settle* the fees issue. It only requires that parties *consider* the issue. The First Circuit provides a safety valve by allowing the parties, if they are unable to reach agreement on fees, to reserve the fees issue for a subsequent hearing by the court. 629 F.2d at 705. This is entirely consistent with the procedure suggested by *Prandini*, and avoids the conflict that may occur if the parties are required to settle the fees issue, a result which is not intended or directed by the First Circuit.

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[18] The Third Circuit has declined to broadly apply *Prandini*. In *Shlensky v. Dorsey*, 574 F.2d 131 (3rd Cir. 1978), it refused to apply the *Prandini* principle in a stockholder's derivative suit. While deciding to apply the same criteria as to amount of fees in both class action and derivative suits, the court refused to insist on a bifurcated approach to settlement.

The *White* decision focuses on the timeliness of a fees motion. This practice promotes fairness to all parties to the litigation. Consideration of the fees issue in settlement promotes fairness by putting the adversary party on notice as to his potential liability for fees. As the First Circuit noted, failure to reveal intentions concerning a fees request itself casts a shadow upon a settlement agreement. *Id.* By encouraging full disclosure by both parties in negotiations and by providing a means for subsequent determination of a fees request, the approach of the *White* court resolves, rather than creates, potential conflict. The decision encourages termination of litigation in an environment of full and fair disclosure, permitting counsel for each side to represent the best interests of the client while protecting the integrity of the adversary process.

CONCLUSION

For the foregoing reasons, the decision of the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

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28 U.S.C. §1927:

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

28 U.S.C. §1920:

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."